IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RICHARD KRAMER, Appellant, v. CLARK COUNTY, a political subdivision of the State of Washington; MILDREN DESIGN GROUP, P.C., an Oregon corporation; and I-205 COMMERCE PARK, LLC, an Oregon limited liability company, Respondents.	No. 34058-5-II UNPUBLISHED OPINION

BRIDGEWATER, J. — Richard Kramer, a developer, appeals the superior court decision denying his Land Use Petition Act petition challenging Clark County's approval of an adjacent property owner's preliminary plat. Kramer argues that (1) the public notice was defective; (2) Clark County (the County) should have required his neighbor to build a cross-circulation road allowing access to Kramer's property as a condition for approval; (3) the County should have required additional frontage improvements on NE 88th Street; and (4) the superior court should have allowed him to supplement the record.

We hold that the public notice was constitutionally sufficient and that the superior court properly refused to consider Kramer's supplemental evidence. We also hold the cross-circulation road Kramer requests would not serve a public purpose and that Clark County could not require such a road as a condition for plat approval. Finally, we hold that Kramer waived his right to challenge the Clark County's decision regarding the improvements on NE 88th Street. Therefore, the superior court properly denied Kramer's Land Use Petition Act petition. We affirm.

FACTS

I-205 Commerce Park, LLC (Commerce Park) sought to subdivide a parcel of land into a multi-lot light industrial subdivision. The parcel is located at NE 88th Street (NE 88th) and NE 64th Avenue (NE 64th) in Vancouver's urban growth area. In its recommendation to the hearing examiner, Clark County (the County) initially required Commerce Park to make frontage improvements and build a right turn lane from NE 88th to NE 64th.

The initial application and site map also included a road heading east to an adjacent parcel of land. Kramer is the purchaser and developer of this adjacent parcel. Kramer's land is bounded on the east and north by federal highway I-205, NE 88th on its southern boundary, and by Commerce Park's land to the west.

Unfortunately for Kramer, his land has significant access problems for future development. I-205 blocks his access to the north and east. His current access onto NE 88th via a driveway is constrained by topographical and safety factors. Moreover, the Commerce Park development will create traffic lines that may interfere with Kramer's driveway. And, apparently, the County plans to restrict access in and out of Kramer's current driveway. Thus, by including a road to his land,

Commerce Park's initial development plan would have been a significant boon to Kramer because it solved his access problems.

The County and Commerce Park, in accord with the County's development codes, sent out notice for a public hearing to adjacent property owners. This notice included a site map showing the road leading to Kramer's property.

Commerce Park included the road to Kramer's property because the County requires that plat applications demonstrate feasibility with the future development of surrounding properties. During the application process, however, Commerce Park noted that because I-205 blocked access to the north and west, this road would serve only Kramer's property. Commerce Park therefore argued to the County that it should not be required to build a public road to a single private parcel. The County agreed and removed the cross-circulation road condition, eliminating the potential for improved access to Kramer's property.

Thus, after the public notice had been mailed, Commerce Park revised its site map and application. In its revised site map, dated July 19, 2004, Commerce Park no longer proposed building the roadway to Kramer's property. But Commerce Park created a special lot, lot 5, on which only a road could be built. And Kramer does not dispute that he could purchase lot 5 and build the roadway himself.

Kramer appeared at the August 26, 2004 public hearing and signed the sign-in sheet. According to its appellate brief, the County had copies of its revised report and recommendations for the Commerce Park project, with the cross-circulation road requirement omitted, available for public review at the hearing. This report included the County's recommendation that Commerce

Park negotiate with Kramer for building an access road. Apparently, Kramer did not review this report even though he was present at the hearing.

At the August 26 hearing, the County requested additional time to study three transportation issues unrelated to the road to Kramer's property. The hearing examiner postponed the hearing until October 14, 2004.

Kramer did not attend the October 14 public hearing. At this hearing, the County told the examiner that Commerce Park's plan satisfied the county code without the right turn lane to NE 64th. The hearing examiner ordered that the administrative record stay open until November 5, 2004, so the County and Commerce Park could complete the administrative record.

On November 24, 2004, the hearing examiner approved the application. The approved application did not require Commerce Park to build the right turn lane or make frontage requirements indicated in the County's proposed condition A-6 or to build a road connecting to Kramer's property. The examiner also adopted the County's recommendation that Commerce Park was "encouraged to negotiate with [Kramer] in order to provide an access easement through this development" but did not require the public road as a condition. 1 Clerk's Papers (CP) at 30.

Kramer appealed this decision to the Board of County Commissioners (Board). He argued that the examiner erred, under Clark County Code (CCC) 40.350.030(B), in not requiring a cross-circulation road across Commerce Park's property to Kramer's. Kramer also asked to supplement the record with several documents, including a memo from Kittelson & Associates, Inc., an engineering firm. This Kittelson memo indicated that the County had misplaced the centerline of NE 88th, leaving too little space for required frontage improvements.

Although Kramer's letter of appeal did not mention a turn lane or traffic problems, the transcript of the Board's decision indicates a third party, Costco, challenged omission of proposed condition A-6 requiring frontage improvements on NE 88th and a right turn lane onto NE 64th. In its review, the Board addressed the necessity of a right turn lane. But the Board did not make a formal ruling on whether they were considering the supplemental materials Kramer provided. The Board affirmed the hearing examiner's decision.

Kramer filed a petition under the Land Use Petition Act (LUPA).[1] In the petition, Kramer argued that (1) the hearing examiner erred in failing to require a cross-circulation road; (2) the hearing examiner erred in deleting proposed condition A-6; and (3) the Board erred in failing to supplement the record.

In response, Commerce Park argued that Kramer did not have standing to appeal the hearing examiner's decision under CCC 40.100.070. Both Commerce Park and the County also argued that Kramer raised only the circulation road issue and could only appeal that issue. Kramer responded that the public notice had been deficient and therefore he was excused from raising these issues below.

The superior court affirmed the hearing examiner's approval of Commerce Park's application. The superior court found that Kramer (1) was not a party of record and therefore did not have standing to appeal the examiner's decision; (2) had sufficient notice to satisfy due process; (3) could not supplement the record because his evidence was not newly discovered; and

[1] The record contains an order consolidating Kramer's petition with Costco's. But Costco did not appear at the superior court hearing and is not a party to this appeal. At oral argument, the County indicated that it had reached a separate settlement with Costco and Commerce Park regarding frontage improvements to NE 88th.

(4) had raised only the circulation requirement and so could raise only that issue in his LUPA appeal. Kramer now appeals all the superior court's determinations.

ANALYSIS

LUPA is generally the exclusive means for judicial review of "land use decisions." RCW 36.70C.030(1). LUPA was enacted to establish "uniform, expedited appeal procedures and uniform criteria for reviewing [land use] decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010.

I. Standing

Kramer first appeals the trial court's conclusion that he did not have standing to appeal the hearing examiner's decision to the Board under the Clark County Code. Kramer urges us to agree with the Board that he satisfied the County's standing requirements by signing the sign-in sheet for I-205 Commerce Park subdivision. We hold that Kramer had standing under the county code to challenge this decision.

The county code limits appeals to parties of record. CCC 40.510.030(H)(1). A "[p]arty of record" includes persons "signing the sign-in sheet noting the person's name, address and the subject matter in which they are interested." CCC 40.100.070. In order to exhaust his administrative appeal rights, Kramer had an obligation to become a party of record and appeal to the Board.

Here, Kramer signed the sign-in sheet and wrote down his name and address. He did not handwrite the subject matter in which he was interested, but the sign-in sheet did include the title: "Application: I-205 Commerce Park Subdivision." 1 CP at 117. Commerce Park now argues

that by failing to handwrite the subject matter in which he was interested, Kramer failed to make himself a party of record and therefore lacked standing to appeal to the Board.

We must therefore interpret CCC 40.100.070 to determine if that ordinance required Kramer to handwrite the subject matter of his interest. Under LUPA, we review challenges to a local jurisdiction's interpretation of the law de novo. *Cingular Wireless v. Thurston County*, 131 Wn. App. 756, 767-68, 129 P.3d 300 (2006). We interpret local ordinances using statutory construction principles. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003). Accordingly, we construe the ordinance as a whole and clear and unambiguous language controls our interpretation. *HJS Dev.*, 148 Wn.2d at 471-72. We must reasonably construe ordinances with reference to their purpose. *HJS Development*, 148 Wn.2d at 472. And we give considerable deference to an agency charged with enforcing an ordinance where the ordinance is ambiguous, but we are not bound by its interpretation. RCW 36.70C.130(1)(b), *Hoberg v. City of Bellevue*, 76 Wn. App. 357, 359-60, 884 P.2d 1339 (1994).

The Board, in addressing this issue, noted that because the title at the top of the sheet identified the subject matter clearly, Kramer met the requirement of signing the sign-in sheet "noting . . . the subject matter in which [he was] interested." CCC 40.100.070. The Board's interpretation is persuasive. The ordinance does not require that the person handwrite the subject, nor does it require that the subject matter be a specific legal issue such as cross-circulation.

And the county code makes it clear that adjoining property owners must receive notice of developments and that their interests should be considered. CCC 40.350.030(B)(2), 40.350.030(B)(2)(a) (explaining purpose of cross-circulation is to allow subsequent

development), 40.510.030(E)(3)(a)(3) (requiring notice to adjacent landowners). As a whole, the code envisions adjacent property owners as parties of record in plat approvals such as this one. Following the Board's interpretation of its own ordinance, we hold that signing a sign-in sheet clearly titled with the general subject matter is sufficient to convey standing under the county code. Therefore, Kramer complied with the county code and had standing to appeal the hearing examiner's decision.

II. Notice

We turn next to Kramer's argument that the County's notice for public hearing for the approval of Commerce Park's preliminary plat was deficient. We hold that the County public notice satisfied procedural due process and complied with the applicable statutes and ordinances.

Although the County and Commerce Park argue that Kramer waived this argument by not raising it until the superior court proceeding, the issue is properly before us. RAP 2.5(a)(3) allows an appellant to raise a manifest error affecting a constitutional right for the first time on appeal. And our Supreme Court specifically noted that our courts ignore the general administrative exhaustion rule when constitutional rights are at issue. *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993). We also note that LUPA specifically allows a party to challenge land use decisions in superior court on the basis that the decision violated the petitioner's constitutional rights. RCW 36.70C.130(1)(f). Because notice is part of procedural due process when a property right is affected, an error in notice does affect a constitutional right. *See Crosby v. Spokane County*, 137 Wn.2d 296, 311, 971 P.2d 32 (1999) (holding a property owner whose property is directly affected by a county zoning decision is

constitutionally entitled to notice).

To confirm that this issue impacts Kramer's constitutional rights, we must first identify Kramer's affected property right. Kramer does not assert he has a common law right to force his neighboring property owners to give him commercial access to his property. Nonetheless, the United States Constitution protects a property right when an individual has a reasonable expectation of entitlement deriving from existing rules that stem from an independent source such as state law. *Wedges/Ledges of CA v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994). And an ordinance can create a property right. *Verndale Valley Citizens' Planning Comm. v. Bd. of Comm'rs*, 22 Wn. App. 229, 232, 588 P.2d 750 (1978) (finding that a favorable zoning decision creates a property right that triggers procedural due process).

Here, the county code requires that circulation plans shall demonstrate "feasibility with development of adjacent properties." CCC 40.350.030(B)(2)(b). The code then provides that "[c]ross-circulation shall be provided in a manner, where possible, that will allow subsequent developments to meet these [block] standards." CCC 40.350.030(B)(2)(c)(1). Read as a whole, the county code gives Commerce Park's adjacent property owners some expectation that their interests will be considered and that private developers in Clark County will develop their land in such a way as to allow neighboring landowners to develop their property. We need not answer whether "feasibility with development of adjacent properties" includes the right to cross-circulation roads.[2] For the purposes of our procedural due process analysis, it is sufficient that

[2] Commerce Park argues that the county code does not mandate that it build a road to neighboring parcels because the code requires only that Commerce Park demonstrate the feasibility of developing neighboring parcels. Assuming this is true, Commerce Park still has to make it possible for Kramer to build such a road connecting to a public street, and, therefore,

Kramer had some property right under the county code. To the extent that Kramer asserts that this right was impaired, he has a property right under the county code and is entitled to procedural due process.

Even if he did not have a property right entitling him to notice, Kramer had a statutory right to notice under the County's ordinance. In proceedings before the hearing examiner, the County must provide notice to "[o]wners of property within a radius of three hundred (300) feet of the property that is the subject of the application." CCC 40.510.030(E)(3)(a)(3). This statutory right to notice includes the right to a map showing the subject property or a reduced copy of the site plan. CCC 40.510.030(E)(1)(d).

Having determined that due process in this case required notice, we must next determine if the notice given in this case was defective. Kramer argues that the public notice was defective because it included a site map depicting a cross-circulation road connecting to his property. He argues that this notice misled him into believing that a cross-circulation road to his property was part of the Commerce Park project. We disagree.

We review procedural errors, such as the adequacy of notice in a LUPA petition, de novo. *Moss v. City of Bellingham*, 109 Wn. App. 6, 26-27, 31 P.3d 703 (2001), *review denied*, 146 Wn.2d 1017 (2002); RCW 36.70C.130(1)(a). Procedural due process requires notice that is reasonably calculated under the circumstances to apprise affected parties of the pending action and to afford them an opportunity to present their objections. *Pease Hill Cmty. Group v. Spokane County*, 62 Wn. App. 800, 806, 816 P.2d 37 (1991).

Kramer has a protected property right under the ordinance.

Where a county's notice misleads citizens, it is defective. *Barrie v. Kitsap County*, 84 Wn.2d 579, 584-85, 527 P.2d 1377 (1974). In *Barrie*, Kitsap County sent out notice for a meeting to discuss a general rezoning and a planned unit development application. *Barrie*, 84 Wn.2d at 580-81. The court determined that the notice was written in such a way as to suggest that the planned unit development and rezoning were part of the same application. *Barrie*, 84 Wn.2d at 584. The court held that because the notice mislead citizens and conceivably deprived affected parties of the ability to intelligently prepare for the hearing, the notice was defective. *Barrie*, 84 Wn.2d at 585-86.

Assuming, without deciding, that the County's initial notice became misleading when Commerce Park amended its proposed plat to omit an east-west road connecting to Kramer's property, the County cured the defect by providing the amended plat proposal at the first public hearing. Kramer attended that hearing and chose not to examine the public record, which included that amended plat proposal.

A sophisticated developer like Kramer should have been aware that conditions and plans are frequently changed during a plat approval process. In fact, the public hearing he attended was postponed for additional findings, putting him on specific notice that this preliminary plat was subject to change. Accordingly, Kramer had an obligation to peruse the most current proposal provided at the meeting.

Moreover, Kramer does not dispute that the County notified him that it would hold another public hearing. But Kramer chose not to attend this subsequent public hearing at which the preliminary plat was finally approved. Had Kramer attended the second hearing, he would

have had the opportunity to raise his objections. And because the hearing examiner left the record open for two weeks, Kramer would have had an opportunity to gather and present evidence to supplement the record had he decided to attend. On these facts, we hold that Kramer had sufficient notice to satisfy constitutional due process.

We also note that Kramer does not argue that the County failed to meet the notice requirements in Washington's platting statutes or in the Clark County Code. RCW 58.17.090(2), for example, requires only that a hearing notice describe the location of a proposed subdivision. This description can be in a sketch or written description. RCW 58.17.090(2). The County's own code is more extensive, requiring a map of the location or site plan. CCC 40.510.030(E)(1)(d). The public notice in this case complied with these requirements. We therefore hold that the public notice in this case was sufficient.

Because we hold that the County provided appropriate notice, we also hold that the superior court properly denied Kramer's motion to supplement the record. Kramer sought to introduce evidence relating to the need for a right turn lane on NE 88th and for other frontage improvements on NE 88th.

LUPA has a provision allowing for supplemental evidence to be presented to the trial court. RCW 36.70C.120(2)-(4). LUPA provides:

> When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding *had an opportunity consistent with due process to make a record on the factual issues*; judicial review . . . shall be confined to the record created by the quasi-judicial body or officer.

RCW 36.70C.120(1) (emphasis added). Thus, in order to limit the judicial review to the

administrative record, LUPA and due process require that a petitioner with a property right have notice and an opportunity to be heard. *Crosby*, 137 Wn.2d at 311 (citing *Veradale Valley Citizens' Planning Comm.*, 22 Wn. App. 229). If the due process is satisfied, the statute provides limited exceptions to the general rule that judicial review is confined to the record the quasi-judicial body created. RCW 36.70C.120(2)-(4). None of these exceptions applies here, and because Kramer had notice and an opportunity to be heard, the trial court properly limited its consideration to the record the hearing examiner created.

III. Cross-Circulation

Kramer's main argument on appeal is that the Clark County code requires private developers to build cross-circulation roads to allow development of surrounding properties. He asserts that the County violated its own code by approving Commerce Park's preliminary plat without a cross-circulation road connecting to his property. The County, joined by Commerce Park, counter that such a condition would be unconstitutional. Because the cross-circulation road would serve only a private purpose, we agree with the County that a government-imposed condition exacting such a road would be unconstitutional. The County could not have mandated such a road even if its code required one. We therefore hold that the superior court properly dismissed Kramer's LUPA petition.

We review the constitutionality of a land-use decision de novo. RCW 36.70C.130(f); *Cingular Wireless,* 131 Wn. App. at 767-68. We analyze a quasi-judicial decision, such as one denying or granting a development permit, under the federal takings clause in the Fifth Amendment. *Burton v. Clark County*, 91 Wn. App. 505, 515-16, 958 P.2d 343 (1998), *review*

denied, 137 Wn.2d 1015 (1999). This clause prohibits the government from taking private property without just compensation. U.S. Const. amend V.; *Burton*, 91 Wn. App. at 515. A county may take land in a quasi-judicial proceeding only if the county can justify its conduct as a proper exercise of its police power. *Burton*, 91 Wn. App. at 517.

In *Burton*, we created a four-part test to determine whether a county may exact a road as a condition for development. First, the county must identify a public problem that the condition is designed to address. *Burton*, 91 Wn. App. at 520. If it is only a private problem, the government lacks a legitimate public purpose and the action is unconstitutional. *Burton*, 91 Wn. App. at 520. And the commercial development of an individual's parcel is a private problem. *Burton*, 91 Wn. App. at 521. Second, the county must show that the development will create or exacerbate the identified public problem. *Burton*, 91 Wn. App. at 521. Third, the county must show that its proposed exaction tends to solve or alleviate the identified problem. *Burton*, 91 Wn. App. at 522. And fourth, the county must show that its proposed solution is roughly proportional to the problem the development exacerbated. *Burton*, 91 Wn. App. at 523.

Here, because the commercial development of his parcel is a private problem, Kramer argues that the public purpose served is to provide an alternative traffic route through Kramer's property in order to alleviate traffic and to provide emergency vehicle access. *See Burton*, 91 Wn. App. at 526 (noting that traffic circulation and emergency vehicle access are public purposes).

But Kramer's proposed solution, building a road to his property, does not alleviate these problems. The proposed road is not, for example, necessary to emergency vehicle access; it

would only be necessary if Kramer wished to develop his land further. Although his current driveway is not sufficient for commercial development, presumably it does allow access to his parcel for emergency vehicles for his current use.

And the road would not alleviate traffic problems exacerbated by Commerce Park's development. As the County and Commerce Park point out, the only evidence in the record is that Kramer's property is commercially landlocked and without any other commercial access. The only possible end point road connecting to Kramer's property is Kramer's current driveway connecting to NE 88th. And because of topography and intersection spacing, the County is planning to restrict Kramer's access through this driveway. In other words, Kramer cannot build a road to connect to the one he wants Commerce Park to build and, therefore, cannot connect the proposed cross-circulation road to the road system. Thus, Kramer's proposed exaction does not tend to solve or alleviate the identified traffic problem because the exacted road will not connect to the road system and will serve only his parcel.

Even if we accepted that Kramer might conceivably build such a road connection in the future, *Burton* made it clear that possible future development is not sufficient to show that an exacted road would alleviate a traffic problem. *Burton*, 91 Wn. App. at 528-29. In *Burton*, it was possible for the future road to connect to another public road, but there was no evidence in the record to indicate when it would do so. *Burton*, 91 Wn. App. at 528. The court reasoned that in the absence of any evidence to indicate when such a road would be built, the exaction was not constitutional. *Burton*, 91 Wn. App. at 528-29. Applying this reasoning to the case before us, Kramer's potential future development is not sufficient to require Commerce Park to build an

access road for Kramer now.

Unlimited v. Kitsap County, 50 Wn. App. 723, 727, 750 P.2d 651, *review denied*, 111 Wn.2d 1008 (1988), controls this issue. In *Unlimited*, Kitsap County conditioned a planned unit development on building a road to a landlocked commercial property. *Unlimited*, 50 Wn. App. at 724. The court noted that there was no expectation that this landlocked parcel would be developed at the same time or "anytime soon." *Unlimited*, 50 Wn. App. at 727. Even if it were, the court reasoned, the public has no interest in developing a private parcel of property and that it would be manifestly unreasonable for the county to exact access from a private developer. *Unlimited*, 50 Wn. App. at 727. Similarly, requiring Commerce Park to build Kramer an access road that would serve only his parcel is manifestly unreasonable.

Kramer tries to avoid this conclusion in two ways. First, he argues that there is evidence in the record that he is developing his property. Second, he argues that a takings analysis is not warranted until a taking actually occurs. The real issue, he argues, is whether the County can approve a development that violates its code. Neither argument is compelling.

Kramer argues that because he has applied for rezoning, we can infer that he will be developing the parcel in the near future.[3] Even assuming that the rezoning does indicate Kramer plans to develop his parcel, it does not indicate that he will be able to connect an eastbound road to NE 88th so as to improve circulation. And given the uncontradicted evidence that Kramer cannot commercially develop his current driveway, the record supports the conclusion that Kramer will not be able to connect Commerce Park's road to NE 88th. Thus, the proposed road

[3] The only evidence for this rezoning application is in the supplemental evidence the trial court properly excluded. There is, therefore, nothing in the record to support this contention.

will not redress the identified public problems.

His second argument is that a takings analysis is inappropriate before a taking occurs. But his argument misses the mark. A county cannot act without a legitimate public purpose. *Burton*, 91 Wn. App. at 520. Because requiring Commerce Park to build a road to Kramer's property serves no legitimate public purpose, the County cannot constitutionally require it as a condition for approving a plat. And it is axiomatic that the county code cannot trump the federal constitution.

Nor is it clear that the county code absolutely mandates a cross-circulation road. Although the code uses mandatory language, it is qualified. For example, in the provision Kramer cites, the code provides that cross-circulation is required "where possible." CCC 40.350.030(B)(2)(c)(1). This is a case in which it is not possible.

And as Commerce Park points out, the other provision requires the circulation plan to "demonstrate feasibility with development of adjacent properties." CCC 40.350.030(B)(2)(b). Here, Kramer's future development is still feasible if he purchases lot 5 in the new development and builds the road himself. Accordingly, if we were to reach the issue, the county code does not require Commerce Park to build a road to Kramer's property.

IV. Condition A-6

Kramer next challenges the hearing examiner's decision to remove proposed condition A-6, which required frontage improvements, including a right turn lane from NE 88th to NE 64th. He argues that Commerce Park cannot demonstrate compliance with CCC 40.350.010, which requires the road to have a 25-foot right of way. The County and Commerce Park argue that

Kramer waived this argument. We agree.

The general rule is that a party waives an argument on appeal by not raising it in administrative proceedings. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 722, 47 P.3d 137 (2002). This general rule applies to LUPA petitions as well. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997). Our Supreme Court imposed this rule under LUPA as part of the requirement that petitioners exhaust their administrative remedies. *Citizens for Mount Vernon*, 133 Wn.2d at 868 (citing RCW 36.70C.060).

Here, Kramer did not raise this issue before the hearing examiner or with the Board, although both considered proposed condition A-6. In fact, the hearing examiner ordered the record held open for additional planning to satisfy the requirement in proposed condition A-6. The Board also addressed the hearing examiner's decision to omit condition A-6. It did so, the record seems to imply, because Costco raised the issue on its appeal.[4] But the Board did not reach the substantive issue. Instead, it decided that Costco did not properly raise the issue before the hearing examiner.

Kramer finally raised proposed condition A-6 as an issue in his LUPA petition. His argument to the superior court and on this appeal is that without an additional land dedication, Commerce Park will be unable to build a sidewalk within NE 88th's right of way.

He argues that he can raise this issue because it was litigated below, even if he did not raise the issue himself. He relies on *King County*, 122 Wn.2d at 660. In that case, the court

[4] We do not have Costco's appeal in the record, but the Board discusses a second appeal letter and a motion to intervene and then discusses whether Costco had notice. We read that to mean Costco was the party raising the condition A-6 issue.

reasoned that although not formally pled, an appellant may raise an issue if it was briefed and argued in the lower courts but not mentioned in the pleadings. *King County*, 122 Wn.2d at 660. Kramer suggests that because the hearing examiner and Board discussed condition A-6, it was briefed and argued below and should be addressed on appellate review.

But this misreads the record. In fact, the hearing examiner considered condition A-6 while trying to determine if a right turn lane was required. The hearing examiner did not discuss whether an additional dedication was required to comply with the frontage improvements to NE 88th that would comply with county code's pedestrian traffic provisions. This is the issue that Kramer raises now. Moreover, the Board did not take oral argument on the issue, and the record does not disclose any briefing on the subject. Thus, there is insufficient evidence in this record to preserve this issue for our review. *King County*, 122 Wn.2d at 660.

Kramer also seems to argue in his brief that the traffic impacts from the development will negatively impact his current access to NE 88th. Presumably, he raises this because a right turn lane would improve traffic that might back up to his driveway. He raises this argument for the first time on appeal, and therefore it is subject to the same wavier and preclusion analysis we discussed above.

V. Attorney Fees

Both Commerce Park and Clark County request attorney fees under RCW 4.84.370. That statute requires the Court of Appeals to award attorney fees to the prevailing party challenging a county's decision to issue or condition a plat, if that party was the prevailing or substantially prevailing party before the county and in all prior judicial proceedings. RCW 4.84.370(1)(a)-(b).

Here, Commerce Park and Clark County prevailed at all levels of appeal and are therefore entitled to reasonable attorney fees and costs from Kramer.

In conclusion, we hold that Kramer had standing to appeal the hearing examiner's decision to the Board. We also hold that Clark County provided sufficient notice of the public hearing on the plat approval. Accordingly, our review was limited to the administrative record and we do not consider Kramer's supplemental evidence. We affirm the trial court's ruling that the cross-circulation road would be unconstitutional on the facts of this case and therefore the hearing examiner did not err in approving Commerce Park's plat without a cross-circulation road connecting to Kramer's property. We also hold that Kramer waived the right to challenge the hearing examiner's decision with regard to frontage improvements on NE 88th.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, P.J.

Hunt, J.